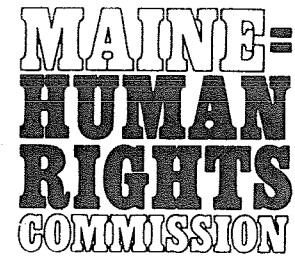


March 18, 2010

Terry Dellarma (Smithfield)

v.

Skowhegan SNF Operations (Hermon)
d/b/a Cedar Ridge Center



51 STATE HOUSE STATION
AUGUSTA, ME 04333-0051
www.maine.gov/mhrc

Executive Director
PATRICIA E. RYAN

I. COMPLAINANT'S CHARGE:

Commission Counsel
JOHN P. GAUSE

The Complainant, who was under medical restrictions due to re-aggravation of a right shoulder injury as of mid-February 2008, alleges was terminated because of disability discrimination when he was fired from his job as Director of Maintenance on 4/18/08, three days after he reported a work related injury to his left knee.

II. RESPONDENT'S ANSWER:

The Respondent denies that it discriminated against the Complainant due to any disability or for reporting a workplace injury and asserts that he was terminated for repeatedly refusing to comply with his medical restrictions and because the Respondent believed that the physical restrictions that prevented the Complainant from performing the essential functions were permanent.

III. JURISDICTIONAL DATA:

- 1) Date(s) of alleged discrimination: 4/18/08¹.
- 2) Date complaint filed with the Maine Human Rights Commission: 6/19/08.
- 3) The Respondent employs 117 individuals and is subject to the Maine Human Rights Act, the Americans with Disabilities Act, as well as state and federal employment regulations.
- 4) The Complainant is represented by Attorney Andrew Mason. The Respondent is represented by Attorney Roberta Ruiz.
- 5) The case was investigated by a thorough review of the written materials provided by the parties and a Fact Finding Conference.

IV. DEVELOPMENT OF FACTS:

- 1) (undisputed) The Respondent operates a 75-bed facility which provides short and long-term care to elderly individuals with injuries and functional disabilities. The Complainant was

¹ The case was originally set for a FFC in January 2008 but was rescheduled to a later date by agreement of the parties based upon their representation that there was a strong chance of settlement.

hired as the "Director of Support Service: Maintenance, Laundry & Housekeeping" (hereinafter "DOM"), where he was responsible for the oversight and supervision of those departments. The Complainant's direct supervisor was Facility Administrator, DM. In March 2007, the Complainant had a (n off-duty) motor vehicle accident which resulted in a left shoulder fracture dislocation and lacerations to his axilla (arm pit) and elbow. He was out of work for a couple of weeks and then returned to work without any restrictions. On or about 2/19/08, the Complainant reported to the Respondent's Workers Compensation Designee, Ms. LL, that he had re-aggravated his left shoulder while shoveling at work. The Complainant was seen at Workplace Health by a "Doctor One," (on 2/2/08) who examined the Complainant and issued a modified duty work restriction of "no use of [left] arm," which was to continue until the Complainant was seen by the orthopedists on 3/18/08. On that date the Complainant was examined by orthopedist "Dr. Two," who issued the following new work restrictions (M1 Practitioner's WC Report attached hereto as "Exhibit A"): *"overhead none/repetitive use as comfort allows lifting = L arm < 15 lbs to waist level only."* On 4/15/08, the Complainant filled out an Employee Incident Report indicating that he had injured his left knee earlier that day while attempting to move a bed frame through a doorway. On 4/18/08, the Complainant was told he was terminated. The "Corrective Action Notice" (Exhibit B) relating to the termination indicates that the two basis for the decision were because the Complainant, "...has injuries that prevent him from performing his work duties. He has restrictions that he has been non-compliant with creating unsafe conditions."

- 2) (Complainant, hereinafter "C") In my eight years working as DOM for the Respondent, I received positive reviews and positive feedback from my supervisors and managers. Within two to three weeks after I injured my left shoulder in a motor vehicle accident on 3/7/07, I was able to return to work and perform my job as DOM, with or without reasonable accommodations. I was able to perform the managerial aspect of my job completely and, with the help of hourly employees working in my department, was able to perform physical duties as well.
- 3) (C) On or about 2/15/08, I reported a work-related injury, re-aggravation of my left arm condition, to my employer. Despite this injury, I continued to perform my job. On or about 4/15/08, I suffered an injury to my left knee while at work. However, after returning to work three days later on 4/18/08, I was summarily terminated for having injuries that prevented me from performing my work duties and for (allegedly) not complying with work restrictions.
- 4) (C) Prior to my sudden termination, my employer did not engage in a particularized inquiry with me or my treating physician to see what duties of my position I was unable to perform, with or without reasonable accommodations, nor did the Respondent contact me or my doctor to determine whether any of my job duties could be altered to ensure my continued employment. The Respondent also did not engage in any discussions with me to determine whether I should be on a disability leave of absence (Workers Compensation or non-work-related leave) because of my medical conditions. The Respondent also failed to provide me with reasonable accommodations despite the fact that such accommodations would have been reasonable in my case, and were shown to be reasonable when afforded to other employees with physical restrictions.

- 5) (C) The reasons given for termination are subjective and pretextual. I believe that I was discriminated against and fired because of my disability and because of my assertion of a Workers Compensation claim.²
- 6) (Respondent, hereinafter "R") The Complainant had workplace restrictions, which the Respondent not only accommodated on a temporary basis, but with which the Respondent required the Complainant to comply. Notwithstanding the Respondent's efforts to provide the Complainant with accommodations and require the Complainant to abide by his restrictions, he failed to do so, producing the precise risk that both the Respondent and his doctors sought to mitigate. The Complainant's disregard for management's directives and his work restrictions resulting in injury to himself and risking injury to others, coupled with management learning that the Complainant's work restrictions were permanent, supported the legitimate, non-discriminatory and non-retaliatory reasons for his termination.
- 7) (R) As DOM, the Complainant was responsible for operational oversight and supervision of the Maintenance, Laundry and Housekeeping departments. The essential functions of his position include maintaining the facility and the exterior grounds, including mowing lawn, snow plowing and snow removal, and routine preventive maintenance repairs. The physical requirements of the DOM position include regular reaching, pushing, pulling, of equipment, wheelchairs or beds across tiled/carpeted surfaces, and transferring objects up to 100 lbs. The Complainant was also a "Safety Officer" and Co-chair on the Safety Committee, which was oversaw the implementing of workplace safety programs, training and drills. As DOM, the Complainant also managed expenses and allocated a budget for his department, including the ability to hire outside contractors when needed for certain critical functions such as snow plowing and snow removal.
- 8) (R) On 2/19/08, the Complainant first reported to Worker's Compensation ("WC") Designee, Ms. LL, that he had irritated his left arm as a result of shoveling & chipping ice (at work) four days earlier. The Complainant was told to fill an out incident report. That same day, at Ms. LL's direction, the Complainant saw Dr One, who allowed the Complainant to return to work on modified duty, requiring no use of the Complainant's left arm until his follow-up consultation with an orthopedic doctor, approximately a month later.
- 9) (R) The Respondent accommodated the restriction by allowing the Complainant to refrain from work requiring use of his left arm. The Complainant was also told that he must comply with that restriction and to use his staff or other resources to assist in the performance of any functions from which he was prohibited. However, the Complainant repeatedly failed to adhere to his work restrictions.
- 10) (R) For example, on 2/26/08, WC Designee LL saw the Complainant using his left arm to pick up a heavy typewriter. She immediately took the typewriter away from the Complainant and instructed him not to lift anything with his left arm, pursuant his doctor's restriction. (LL's memo regarding the incident are attached hereto as "Exhibit B-1")

² While the Maine Human Rights Commission does not have jurisdiction over Workers Compensation retaliation claims against a current employer, it may be considered as circumstantial evidence of disability discrimination.

- 11) (R) Just days later, on May 14, 2008³, Office Mgr. YE saw the Complainant carrying two large jugs of chemicals in each hand and she informed the Complainant that him carrying the jugs were bad for his shoulders, but C did not respond. (Memo attached as Exhibit B-2)
- 12) (R) Shortly *thereafter* [see footnote below], on two separate occasions on 3/17/08, two different employees reported to Office Mgr. YE that they had observed the Complainant carrying a ladder using his left arm, one of whom also stated that she had seen the Complainant "working on an overhead light fixture using both arms on and off for about an hour." Office Mgr. YE sent a memo (Exhibit B-3) to WC Designee LL about the incident.
- 13) (R) On 3/18/08, the Complainant was examined by Orthopedist, Dr. Two, who modified the Complainant's work restrictions permanently [Respondent's emphasis in original] to 1) no overhead work 2) repetitive use "as comfort allows"; and 3) no lifting more than 15 pounds with his left arm, and no higher than to waist level. (Respondent is referring to Exhibit A, attached.)
- 14) (R) The Complainant gave the M1 Practitioner's WC Report on which these restrictions were contained to Office Mgr. YE. These updated restrictions caused concern because, while the Respondent could accommodate temporary restrictions, as it had been doing, the ability to accommodate Complainant inability to perform several essential functions *indefinitely*, was another matter.
- 15) (R) Over next few weeks, Facility Administrator DM continued to consult with the Respondent's Regional HR Mgr. EL regarding whether they could possibly accommodate the Complainant's restrictions on a permanent basis, however, in the interim, the Complainant continued disregarding Respondent's directive that he comply with his work restrictions.
- 16) (R) For example, on 3/24/08, WC Designee LL observed the Complainant with a shovel and an ice pick in his hands and it appeared to her that he had been outside. After reporting the incident to Facility Administrator DM, LL spoke to the Complainant about the incident and he admitted during that conversation that Facility Administrator DM had told him (Complainant) to hire someone to remove the ice, but he claimed he could not find anyone to do it, so he had done it all weekend and that day (Monday). The Complainant also claimed that he had only used his right arm to perform the task. (Memo attached as Exhibit B-4)
- 17) (R) On 3/27/08, in response to these repeated observations and reports that the Complainant had been engaging in activities in violation of his doctor's restrictions, Office Mgr. YE and WC Designee LL both met with the Complainant to counsel him again not to engage in any physical activity beyond his restrictions, under any circumstances. However, not only did the Complainant admit that he had been violating management's directive not to exceed his restrictions; he boldly stated that he would continue to do so. (Memos regarding the 3/27/08 meeting prepared by YE and LL are attached as Exhibit C)

³ It is unclear precisely when this alleged second incident of non-compliance with restrictions may have occurred. The May date provided is obviously more than "few days" after the preceding typewriter incident, and the purported contemporaneous memo from Office Manager YT, who witnesses the second incident, is dated "4/14/08, Monday." Based upon the fact that 4/14/08 was indeed a "Monday," it is presumed that that date is most likely the correct one.

- 18) (R) The incident which ultimately led to the Complainant's termination occurred on 4/15/08, when, in blatant disregard of his restriction not to lift more than 15 pounds, the Complainant attempted to lift a 400 pound hospital bed. Another employee (Ms. NO) noticed the Complainant trying to move the bed and she offered to assist him. However, even with her assistance, they still struggled. As the Complainant continued to push and shove the bed frame, it gave way, falling onto the Complainant's right⁴ leg. Fortunately, Ms. NO was not harmed. Copies of the Incident Report, First Report of Injury form, and Ms. NO's statement are attached as Exhibit D.
- 19) (R) On the day in question, the Compactor had five subordinates (including Ms. NO) who could have assisted him with moving the bed that day. Following this incident, and after months of counseling the Complainant, Facility Administrator DM, in consultation with Respondents Regional HR Mgr. EL and Office Mgr. YE, the collective decision was made to terminate the Complainant. This decision was consistent with the Respondent's progressive discipline policy which allows for dismissal for even a first offense of insubordination.
- 20) (R) On the Complainant's next scheduled work day, 4/18/08, he had a meeting with Facility Administrator DM and the Director of Nursing (there only as an observer). DM explained that despite the Respondent's efforts to accommodate his work restrictions and provide him with necessary resources, they could no longer tolerate his repeated refusal to comply with directives and abide by his work restrictions, which placed the Complainant as well as others at risk. This last incident also confirmed to management that it would not be possible to accommodate the Complainant's physical restrictions, which prevented him from performing many essential job functions, on a permanent basis (as per his physician's order). This additional basis for termination was also communicated to the Complainant.
- 21) (R) Notably, at no time during the many discussions with the Complainant did he ever state, or even imply, that he believed he was being discriminated against because of his injury, his filing of a Worker's Compensation claim, or any alleged disability. With respect to the claim that the Respondent failed to engage in the interactive process, it accommodated the Complainant by providing modified duty up until the time his employment was terminated for failure to follow directions; thus, there was no need to further engage in the interactive process. If anything, it was the Complainant who interfered with interactive process by failing to abide by his restrictions. Between January and April 2008, ten of Respondent's employees who had work restrictions after a work related injury, returned to work on modified duty and, having complied with their restrictions, returned to full duties.
- 22) (Complainant) On 3/7/07, the Complainant swerved his truck to avoid hitting a dog and the truck flipped onto its side, pinning the Complainant's left arm. He dislocated his shoulder and had two lacerations. The Complainant was still being treated for this injury on 8/7/08, four months after his termination, easily beyond the six month threshold limit under the 5 MHRA § 4553-A (2)(B)'s definition of "significantly impairs physical...health. Just after the Complainant's motor vehicle accident, his (then) spvsr, Facility Administrator NE,

⁴ The Incident Report and First Report of Injury form indicate that it was in fact the Complainant's left knee.

visited the Complainant in the hospital and understood the severity of his injuries. The Complainant returned to work with an arm sling, and he spoke about the accident to his staff.

- 23)(C) As an additional basis for terminating the Complainant, the Respondent also asserts that the 3/18/08 M1 (Exhibit A) contained new, "permanent restrictions." However, that is a misreading of the form. In fact, at the bottom of the form, there are two separate questions:

* Is permanent impairment expected? To which, Dr. Two checked off "'yes," and;

* Has MMI⁵ been reached? To which, Dr. two checked off "no."

- 24)(C) The fact that Dr. Two stated that MMI had not been reached demonstrates that these restrictions were not permanent. Dr. Two suggested that the Complainant perform "overhead/repetitive use *as comfort allows* [emphasis added]; left arm lifting limited to 15 pounds, to waist level only." Dr. Two was only making a prospective determination that permanent impairment was *expected*, not that the Complainant's injury was suddenly more severe than it was before. Dr. Two was not updating or modifying any restrictions on the Complainant that should cause any additional concern because, as the physician narrative⁶ (attached hereto as Exhibit E) that accompanied the M1 indicated, the shoulder was essentially the same as it was at the time of his injury.

- 25)(C) Further, these workplace restrictions were only *suggested* by Dr. Two. As he stated in the narrative, "I do not think that he is going to be able to do overhead work effectively, and he should limit lifting with the left upper extremity to not more than 15 pounds at waist level only. *As he feels more comfortable, he may be able to increase these restrictions.*" [Emphasis added] This demonstrates that the Dr. Two believed that the February 15, 2008 incident was only a re-aggravation of his 2007 original motor vehicle accident shoulder injury. Dr. Two also stated he expected his suggestions might be modified in the future, thus it was an error to interpret the M1 as assigning "permanent" restrictions. Rather, reading the accompanying narrative, it is clear that Dr. Two was only suggesting parameters to the Complainant in the hope that following them would not further exacerbate his pain ("...he *should* limit lifting...") In sum, Dr. Two's suggestions were not intended to be, nor did the Complainant consider them to be, a condition of continued employment. The doctor was simply warning the Complainant that exceeding these restrictions could result in pain and discomfort to him.

- 26)(C) The Respondent also takes great pain documenting alleged instances when the Complainant was not complying with the workplace restrictions imposed by the Workplace Health general practitioner, Dr. One, on 2/22/08. However, Dr. One had no medical records or understanding of the Complainant's 2007 motor vehicle accident and shoulder injury. All Dr. One did was refer the Complainant to a specialist and said not to use his left arm. The Complainant was more aware of what he could and could not do with his shoulder than this doctor. By the time Dr. Two later saw the Complainant in March, he noted that there was nothing more he could do for the Complainant's shoulder at that time, therefore, the

⁵ "MMI" is a frequently used Workers Compensation abbreviation for "maximum medical improvement."

⁶ There is no indication the Respondent ever saw or received a copy of this narrative prior to the MHRC charge.

condition of the his shoulder in February 2008, was largely the same as it had been in the months that preceded the February 2008 re-aggravation, when the Complainant was able to perform his job duties. The only difference was that an uninformed workplace doctor put an unnecessary restriction on the use of the Complainant's arm, and then referred him to a specialist, who subsequently removed the unnecessary restriction.

- 27) (C) Also, while specialist Dr. Two did suggest that the Complainant limit his lifting with his left arm to less than 15 pounds, as well as expressing his belief that the Complainant would have some difficulty working overhead, *he did not restrict him from doing so*. Rather, as his accompanying narrative clarified, overhead use was permitted "as comfort allows."
- 28) (C) Therefore, during neither lifting the typewriter lifting incident (on 2/26) nor carrying jugs (mistakenly listed by the Respondent as 5/14/08, after the Complainant was fired) as involved performing actions beyond what the Complainant could safely handle. With respect to the reported incident of 3/17 (when the Complainant was seen working overhead and carrying ladder), that too was okay because the Complainant could do overhead work, "as comfort allows."
- 29) (C) The Respondent also mentions an incident on 3/24, when WC Designee LL observed the Complainant with a pick and shovel in his arms shovel and the Complainant explained to her, in response to her questioning, that he had used only his right arm. The Complainant also maintains that he paid \$40 (of his own money) to a young man to chip ice and remove ice while he supervised over the weekend in question. There is no evidence demonstrating that the Complainant ever exceeded any alleged restriction with his left arm.
- 30) (C) The Respondent also attempts to justify its termination of the Complainant by asserting that he was "insubordinate," based solely on the observations of Office Mgr. YE and WC Designee LL (a secretary), neither of whom were the Complainant's supervisor. In fact, the person who was the Complainant's supervisor, Facility Administrator DM, never warned the Complainant that he was in danger of losing his job if he did not follow any "restrictions." When a secretary or office manager would tell the Complainant he should not be performing a certain activity his typical response would be "you're right, but it needs to get done." By definition, for his actions to be "insubordinate," he would have to refuse to submit to the authority of someone who had authority to control his actions in the first place. There are is also no evidence or any verbal or written discipline relating to any alleged incidents of insubordination in his file, only memos to the file.
- 31) (C) With respect to the bed incident on 4/15/08, which the Respondent uses as justification for terminating the Complainant, while he did have a 15 pound *lifting* restriction, he had no "*pushing/pulling*" restriction. The Respondent even admits that the Complainant was not "lifting" the bed in question. They stated the Complainant "...proceeded to *push and shove* the bed frame..." The witness statement (from the person who tried to help the Complainant with the bed) describes the Complainant's actions as "...*dragging* a bed frame...[and] ...*pushing* the bed... [and]...*pushing and shoving* the frame. These facts demonstrate that even if the Complainant had work restrictions, as it concerns this incident, he did not exceed any restrictions.

- 32)(C) Further, the Complainant did not re-injure his shoulder during the bed incident, he injured his knee, and not because of anything to do with his shoulder or because of any lifting restriction. Rather, his knee was injured when he asked the person helping him to hold the bed frame so that he could reposition his right leg for more strength, and she did not do so, causing the frame to fall, twisting his left leg which was planted for leverage against the bed frame. This accident was merely a pretext for the discriminatory termination which followed.
- 33)(C) Not only did the Respondent misread the M1 for the proposition that the Complainant work restrictions were "permanent," they also never listed what if any essential job functions that the Complainant would be unable to perform. In the seven page job description for the Complainant's position, it is clear that, like most supervisory positions, physical requirements are not an essential function. The only bullet point under "Physical/Emotional Effort required" that even hints at physical activity is that notes "lifting and transferring objects of up to 100 lbs."
- 34)(C) Further, Mr. NE, the Complainant's former supervisor (until December 2007), and Facility Administrator DM's predecessor, who was ware of the Complainant's capabilities both before and after the February 2008 re-aggravation of his shoulder, noted (in a recommendation letter prepared after the Complainant termination), in part, that:

"It is my pleasure to highly recommend [Complainant] for any position... [He] consistently demonstrated a high level of competence, ingenuity, creativity and efficiency in carrying out his assigned duties... In the past winter, [Complainant] suffered permanent injury to his left shoulder as a result of an auto accident. While it has necessarily placed limitations on him, he is, not surprisingly, learning to make accommodations which allow him to continue to function adequately in almost all facets of maintenance and repair work."

The only thing that changed between the time the Complainant injured his shoulder in February 2007 and January 2008, was that DM replaced NE as the Respondent's Facility Administrator.

- 35)(C) In sum, the Respondent can not point to any incident where the Complainant exceeded the arguable restrictions specialist Dr. Two detailed. The Complainant was within his abilities to lift jugs up to 15 pounds up to his waist, and he could do overhead or repetitive activities (chipping ice, changing a ballast) within comfort. He was also able to perform the essential functions of his supervisory position. The Respondent's decision to terminate him immediately after he injured his *knee*, raises a clear inference of retaliation and discrimination, especially when the reasoning used to justify his termination have been refuted and exposed as pretextual.
- 36)(Respondent) At not time after either Dr. One or Dr. Two issued work restrictions did the Complainant ever dispute either doctor's restrictions, nor did he report to Respondent that he believed them to be excessive, or that he desired a second medical opinion, either after he was reprimanded for exceeding those restrictions, or even at the time of his termination. Instead, as even the Complainant admits in his written submission, he was violating his work

restrictions with impunity, and, when confronted directly by Office Mgr. YE and WC Designee LL about this at a meeting and advised him he should not be doing a certain activity, he responded by saying, "You're right, but it needs to get done." Further, the Complainant also never asserted at the time of his term or any other time that he did not consider the restrictions listed on the M1 to be permanent, even when this issue was discussed as a reason at the time of his termination.

- 37) (R) Also, logic and reason dictate that anyone who is attempting to move a 400 pound bed, as the Complainant did on 4/14/08, is violating a 15 pound lifting restriction. The Complainant's claim that no lifting [with his left arm] was required to move and rotate a bed frame onto its side to fit through a door is incredulous.
- 38) (R) Further, while the Complainant argues that, because he held a supervisory position, physical requirements were not essential functions of his position, included responding to unscheduled maintenance tasks/requests, minor carpentry, plumbing (replace toilet seals, unclog drains), lawn mowing, snow removal, floor buffing, change lights, etc. The Respondent had no obligation to eliminate such duties.
- 39) (R) Finally, while it is true that Office Mgr. YE and WC Designee LL may not have had supervisory authorization over the Complainant (as Facility Administrator DM had), they were in charge of administering workplace injury reports and workplace restrictions. They oversaw and reported to Facility Administrator DM on employee's restrictions and need for accommodation, including the Complainant's. It is disingenuous for the Complainant to suggest that they were mere office clerks since these were the exact people the Complainant chose to present the M1 to as soon as he received it in March 2008.
- 40) (Investigator) The following additional information was offered by the parties and witnesses at the Fact Finding Conference:

Complainant: While I did not have any medical treatment on my shoulder between the time of the motor vehicle accident in March 2007 and the time I re-aggravated it in February 2008, I did consult with a doctor in Portland regarding treatment options. There were no work restrictions in place during that time frame and the condition of the shoulder remained about the same. I was working by myself when the February 2008 re-aggravation happened. I believe I reported the injury on my next scheduled working day. I met with Dr. One soon thereafter and I spent about 30 minutes with him as he took my medical history and did some range of motion procedures. I am not sure if I read Dr. One's report and restriction on using my left arm before I passed it in to the Respondent. I am not sure if Dr. One told me not to use it at all or just to use it as little as possible. From Dr. One's appointment in mid-February until the appointment with orthopedist Dr. Two (on 3/18/08), I did at times need some help with some tasks, like shoveling or possibly putting jugs of soap (which weight about 35 pounds) onto shelves on the wall. I probably did use my left arm during that span of time, but I never re-injured it. I do recall WC Designee LL, and possibly Office Mgr. YE, mentioning to be careful with my arms. I recall that when I did pick up the typewriter, I used both arms and I only moved it a few feet from one table to another. It was very light, probably no more than 10 pounds. At that time I told LL that I did not believe that I was exceeding my

restrictions. Although I did use my left arm at that time, this was after my visit to Dr. Two, who longer restricted all use of that arm. My appointment with Dr. Two lasted about 15 minutes and he had the x-rays from my auto accident. He also checked the range of motion for my left shoulder. I believe that Dr. Two's restrictions were less restrictive than those originally imposed by Dr. One. After receiving Dr. two's restrictions, I was still getting help with some help shoveling. I do not believe that a shovelful of snow would weigh more than 15 pounds. I was also never told to avoid overhead work all together. I do not recall ever carrying two full jugs in each hand as the Respondent alleges, although I may have had a full jug in one hand (my right) and an empty jug in my left hand. I am left handed. A full jug weights about 35 pounds. I did not request help on these occasions because I did not need help. While help was normally available, there were times when no one else was around and I would have to look for help. I do recall changing the ballast in Facility Administrator DM's office but it only weighed about five pounds. It did involve working overhead and I did use my left arm to some extent. I used and carried a ladder (which weighed about 15 pounds) on that day, but I used only my right arm. I do recall the weekend when I paid someone (my stepson) to do the ice picking. I might have later carried the pick and shovel from one location to another but I did not do any picking or shoveling that weekend. I also do not recall having a meeting with Office Mgr. YE and WC Designee LL to discuss this, nor do I recall saying that I would continue to do so (exceed my work restrictions). The bed that I tried to move in mid-April was capable of holding a patient of up to 400 pounds, but the bed only weight about 125 pounds, including the frame, mattress, and headboard. I tried to move the bed myself because I did not think a help was needed. The only thing I used my left arm for during the entire process was maybe just for balance. A nurse saw me hurt my knee and told me to ice it and then said to get it checked out. I was put on crutches for the day. When I returned to work a few days later, I was fired. I was told it was because I had restrictions beyond what they could deal with, and because of insubordination. I do agree that Office Mgr. YE probably did have authority to enforce medical restrictions at the workplace even if she was not my direct supervisor. Although the re-aggravation of my shoulder in February did cause more pain, the arm really functioned the same as before, and within a couple of weeks, it was back to baseline. I was on vacation from 2/29/08 though 3/12/08. In looking at my job duties, I believe that shoveling was really the only duty that would be a problem with my restrictions, and I did have an assistant⁷, to help me with that task. The assistant worked the same a schedule as I did. I admit that the letter of recommendation from the previous Facility Administrator does refer to me having a "permanent" injury to my shoulder and that I was doing "almost" all of my work duties. I believe that probably spent about 80%-90% of my workday behind a desk, with the remainder of the time working around the facility. I agree that in response to a question from Office Mgr. YE or WC Designee LL about why I should not be doing a certain activity, it might have said "You're right, but it needs to get done." That sounds like something I would say. Before I moved the bed, I disconnected the headboard and footboard, which simply dropped into a slot. I used my right arm almost exclusively. The other person came over to help me and when I asked to wait so I could switch to using my right arm, she let go of the frame and it hurt my knee. Her statement is wrong in that I already had the headboard removed by the time she began to help me. I do not recall if I ever told anyone after the incident that I had only used my right arm to move the bed. I do not believe that the bed incident was discussed at the time of my termination.

⁷ Since August 2006, a "Maintenance Helper" was one of the Complainant's subordinates within the department.

Facility Administrator DM – I began working for the Respondent in my position in early 2008. Office Mgr. YE, or WC Designee LL (who was learning to take over the HR aspects of Office Mgr. YE's job) would be responsible for monitoring an employee's compliance with work restrictions but I would be aware of them as well. I recall it being reported to me on at least one occasion that the Complainant was exceeding his work restrictions by chipping ice, although I do not believe I spoke with the Complainant directly about this. I know however that both YE and LL had spoken to him about violating his restrictions on multiple occasions. The decision to terminate the Complainant was made after we had already received notice that his work restrictions were going to be permanent. We were in the process of reviewing whether we could accommodate him, and then we received a serious safety concern: the Complainant had far exceeded his weight restriction by moving a large hospital bed and had injured himself in the process. I have moved these beds myself and know how much they weigh. I did assume that the Complainant's restrictions were permanent based upon the fact that the doctor had checked off "yes" next to permanent impairment. I did not notice the other box indicating MMI had not been reached nor was I aware what MMI meant at the time, as I do not normally handle Worker's Compensation forms. I never saw the narrative from Dr. Two that the Complainant later submitted to the MHRC. I agree that I did not discuss possible accommodations with the Complainant or his doctor after receiving the M1.

WC Designee LL – I have been with the Respondent for about nine years in a number of positions, including receptionist, payroll, and scheduling. In 2007-2008 I was doing payroll and training to eventually take over all Office Mgr. YE's Worker's Compensation duties, which began in January 2008. After the Complainant reported to me in mid-February that he had injured his arm chipping ice, I sent him to see Workplace Health (Dr. One), who issued a workplace restriction that the Complainant not use his left arm. I discussed this restriction with the Complainant although it seemed rather straightforward. Part of my duties was to watch employees who were on any work restrictions and speak to them if they were not complying. I do sometimes have to remind other employees on occasion that they should not be exceeding their work restrictions, but never multiple times, as I had to with the Complainant. I was also the one who observed the Complainant pick up a good-sized plastic typewriter off of the floor of my office to take it to his office and I told him directly that he should not be doing that because of his arm and I took the typewriter from him. I do not believe that I reported this incident to Facility Administrator DM after it happened, but I did create a memo. On another occasion, I saw the Complainant carrying an ice pick and a shovel, although I did not actually see him using them. I was concerned because I knew he could not be picking ice with only one arm. I do recall having a meeting with Office Mgr. YE and the Complainant where she and I told him that he should not be doing certain jobs, but his response was, "Well it has to get done."

V. ANALYSIS AND CONCLUSIONS:

- 1) The Maine Human Rights Act requires the Commission to "determine whether there are reasonable grounds to believe that unlawful discrimination has occurred." 5 M.R.S.A. §

4612(1)(B). The Commission interprets this standard to mean that there is at least an even chance of Complainant prevailing in a civil action.

- 2) The Maine Human Rights Act, 5 M.R.S.A. § 4572(1)(A), prohibits an employer from discharging an employee because of "physical or mental disability."
- 3) The Maine Human Rights Act, 5 M.R.S.A. § 4553-A, defines "physical or mental disability," in relevant part, as follows:
 1. **Physical or Mental Disability, defined.** Physical or mental disability" means:
 - A. A physical or mental impairment that:
 - (1) Substantially limits one or more of a person's major life activities;
 - (2) Significantly impairs physical or mental health; or
 - (3) Requires special education, vocational rehabilitation or related services; . . .
 - C. With respect to an individual, having a record of any of the conditions in paragraph A or B; or
 - D. With respect to an individual, being regarded as having or likely to develop any of the conditions in paragraph A or B.
 2. **Additional terms.** For purposes of this section:
 - A. The existence of a physical or mental disability is determined without regard to the ameliorative effects of mitigating measures such as medication, auxiliary aids or prosthetic devices; and
 - B. "Significantly impairs physical or mental health" means having an actual or expected duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population.
- 4) The MHRA does not prohibit an employer from discharging or refusing to hire an individual with a physical or mental disability when the employer can show that the employee or applicant, "because of the physical or mental disability, is unable to perform the duties or to perform the duties in a manner that would not endanger the health or safety of the individual or others. . . ." 5 M.R.S.A. § 4573-A(1-B).
- 5) The defense requires an individualized assessment of the relationship between an employee or job applicant's physical or mental disability and the specific legitimate requirements of the job. *See Higgins v. Maine C. R. Co.*, 471 A.2d 288, 290 (Me. 1984); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1234 (Me. 1983). The defense imposes upon the employer the burden of establishing that it had a factual basis to believe that, to a reasonable probability, the employee or job applicant's physical or mental disability renders him or her unable to perform the duties or to perform them in a manner that would not endanger the health or safety of the employee or job applicant or others. *See Canadian Pacific, Ltd.*, 458 A.2d at 1234. An employer cannot deny an employee or applicant an equal opportunity to obtain gainful employment on the mere possibility that a physical or mental disability might endanger health or safety. *See Id.*
- 6) As a part of his claim, 5 M.R.S.A. § 4572(1) (A) does not require Complainant to prove that he was capable of performing the job. Rather, the burden rests with Respondent to

prove, through an individualized assessment, that Complainant *could not* perform the job due to his disability. See 5 M.R.S.A. § 4573-A (1-B); *Maine Human Rights Com. v. Canadian Pacific, Ltd.*, 458 A.2d 1225, 1230, 1234 (Me. 1983). Disability is thus treated the same as any other protected class under section 4572(1) (A), and Complainant's burden of proof is the same as it would be, for example, in cases of race or sex discrimination. In this regard, the Maine Act and its federal counterpart, the Americans with Disabilities Act, differ substantively. The ADA requires plaintiff to prove that he or she is "qualified," meaning able to perform the "essential functions" of the job in question. See 42 U.S.C. § 12112(a) (prohibiting discrimination against a "qualified individual with a disability") (emphasis added); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996) (allocating burden). See also 5 M.R.S.A. § 4572(2) (prohibiting discrimination against a "a qualified individual with a disability"). Although two Law Court decisions have referenced a requirement under the Maine Act that a plaintiff prove that he or she is "qualified" and able to perform the essential functions of the job, see *Doyle v. Dep't of Human Servs.*, 2003 ME 61, ¶ 14, 824 A.2d 48, 54 and *Whitney v. Wal-Mart Stores, Inc.*, 2006 ME 37, ¶ 9, 895 A.2d 309, 312, in both cases, the Law Court touched on the standards in passing and did not address the differences between sections 4572(1) and 4572(2). The reference was also dicta in both cases and is not controlling. In *Doyle*, the Law Court based its decision to affirm summary judgment on the plaintiff's failure to establish that the reasons given for the termination of her probationary period were pretextual or irrelevant. 2003 ME 61, ¶ 18, 824 A.2d 48, 56. The Court specifically noted that it was not addressing whether the plaintiff had established a prima-facie case of discrimination. 2003 ME 61, ¶ 16 n. 8, 824 A.2d 48, 54 n. 8. In *Whitney*, the Court decided only a certified question concerning the scope of the definition of "physical or mental disability" under the Maine Act. 2006 ME 37, ¶ 1, 895 A.2d 309, 310.

- 7) a. Since the alleged disability in this case originated in March 2007 and remained medically unresolved and largely unchanged as late as a medical appointment in August 2008, is found that the Complainant's shoulder injury does qualify as a physical disability under the 5 M.R.S.A. § 4553-A(1)(A)(2) & (2)(B) in that it "significantly impairs physical... health," meaning having an actual duration of more than 6 months and impairing health to a significant extent as compared to what is ordinarily experienced in the general population. Moreover, Complainant was regarded by Respondent to be disabled, particularly in light of Facility Administrator DM's belief that Exhibit A imposed permanent restrictions.
- b. In this case the Complainant alleges that he was unlawfully terminated due to his physical disability and that the Respondent failed to engage in the legally mandated interactive process and discussion of essential functions and possible accommodations prior to determining that he was no longer qualified to do his job.
- c. The Respondent answers that the Complainant was legally terminated for a legitimate business reason, including his repeated failure to abide by directives that he comply with his doctor's work restrictions, and because the last set of work restrictions were permanent, and therefore unable to be accommodated on an indefinite basis.

d. The Complainant argues that the Respondent's asserted reasons for his termination are pretext, in that he was not insubordinate, and because his restrictions were not permanent.

8) In arriving at a recommendation the following facts are noted:

a. It is found probable that the Complainant likely exceeded his work restrictions on many of the occasions cited by the Respondent. From mid-February 2008 through the date of his orthopedic consultation in mid-March, the Complainant freely admitted that he did use his left arm on occasion, but he attempts to offset or defend his actions by emphasizing that he did not re-injure it. Clearly had the Respondent been aware that the Complainant was blatantly ignoring his work restrictions and an injury had resulted, the Respondent would likely be liable for not ensuring compliance. The Complainant admitted he lifted a typewriter and that WC Designee LL advised him that it was beyond his restriction, which was at the time, no use of his left arm. In response to the allegation that he was seen carrying heavy two jugs in each hand, the Complainant's written submissions to the MHRC defend that charge primarily by stating that carrying jugs was not beyond his restrictions because he was allowed exceed his restrictions "as comfort allows." However, for the first time at the Fact Finding Conference, the Complainant asserted that while he may have been seen with a single jug in each hand, the one in his left arm was empty. The Complainant also claimed, when confronted about being seen with an ice pick and shovel, that he had only carried the items from location to another, but had never used them. At the Fact Finding Conference the Complainant claimed that whenever he was compelled to remove snow, he used a scoop that slid across the ground and that he did not use his left arm at all while moving the snow and that this did not cause any pain in his injured shoulder. However, in Dr. Two's narrative (dated 3/18/0) he specifically notes that the Complainant is still working for the Respondent and that "...when he is chiseling snow and ice...his shoulder is in aggravated and he has sever pain." It does not sound as though the Complainant was referring just to the single incident in mid-February when he re-aggravated the shoulder, but rather to an ongoing task that arose and was part of the "10%" physical aspect of his job that he was admittedly unable to do without experiencing pain. The Complainant also admitted that he did overhead work (changed lights and ballast) when he was under a restriction not to do so because he thought he was free to do so as "comfort allows." Regardless of his interpretation of his restrictions, to the Respondent, it was a more than reasonable perception that the Complainant repeatedly and openly defied their directions that he abide by all then current restrictions. Finally, as the Complainant wrote in his submissions, and later confirmed at the Fact Finding Conference, he admitted to Office Mgr. YE and WC Designee LL at their March meeting that he had knowingly violated his restrictions on occasion because he believed a certain task "needed to get done." While such work dedication is admirable under some circumstances, when "getting it done" involves violating medical restrictions rather than seeking help from one's own staff (or assistant), or hiring outside contractors, as the Complainant had been authorized and instructed to do, the ends do not justify the means.

b. Also, while the Complainant may have felt compelled to violate his restrictions performing certain jobs "because they needed to get done," he has admitted that not only did the Respondent advise him to use one of handful of subordinates to assist him with

prohibited tasks, but that he had also been directed to hire outside contractors for larger jobs, such as snow removal or chipping ice, that were too large for him or his staff to handle. Further, as a supervisor, and "Safety Officer and Co-Chair of the Safety Committee," the Complainant was setting a very poor example for other employees by knowingly violating his restrictions. If the Complainant truly believed that Dr. One's prohibition on any use of his left arm was excessive, then it was up to the Complainant to raise the issue with Dr. One, or seek a second opinion from some other equally qualified medical provider. At the very least one would assume that if the Complainant believed the restriction to be patently unreasonable, that he would have said so explicitly the first time he was confronted by Office Mgr. YE or WC Designee LL about exceeding that restriction.

c. Instead, as the Complainant stated in a submission to the MHRC, he believed that he "...was more aware of what he could and could not do with his shoulder..." than Dr. One. The Complainant's also seeks to characterize the work restrictions issued by the two physicians as mere "suggestions," intended to guide him as to what activities or motions might cause him pain or discomfort, rather than medical limits that had been set by individuals who presumably had far more expertise in this area than did the Complainant. These restrictions were no more "suggestions" than were the dosages prescribed for various pain medication he also received were only "suggestions" how much or how often he should take it.

d. It is also found that part of the Complainant's interpretation of the restrictions found on the M1 (issued by Dr. Two), namely working overhead "as comfort allows," is not supported by the plain language and layout of that portion of the document. The first two words employed in that section appear to unequivocally state "overhead **none**." (emphasis added). There is then a clear vertical slash, normally a sign that the writer wants to differentiate whatever is to follow from the preceding section, and then follows the additional phrase of "repetitive use as comfort allows." Given the normal, everyday meaning of the word in question ('none'), and the use of the slash, it is found far more likely that Dr. Two intended to restrict all overhead work by the Complainant. It is true that the accompanying narrative to the M1 does state that the doctor believed only that the Complainant could not do overhead work "effectively" and that "[a]s he feels more comfortable, he may be able to increase these restrictions," thereby suggesting that these restrictions were not necessarily absolute or permanent. However, it would stretch to suggest that, by this language, that the doctor meant that the Complainant was free to disregard whatever the current restrictions might be, and unilaterally decide, without any input or testing by his doctor, or consultation with his employer, to change his lifting restrictions or decided to engage in overhead work. Further, since it is undisputed that the Respondent did not have the benefit of ever seeing the accompanying narrative to the M1, they can not be faulted for drawing its interpretation of the Complainant's restrictions from the four corners of the M1 alone.

e. However, the Respondent has misinterpreted a portion of the M1. As the Complainant has pointed out, the notation of a "permanent impairment," does not, in all cases, equate to permanent restrictions. The indication that "MMI," maximum medical improvement, had

not yet been reached also suggests that there was some possibility of improvement in the Complainant's medical condition, and concomitantly, the chance that his work restrictions might be relaxed as well if that improvement did occur. Instead, it appeared that the individual who had primary responsibility for interpreting this document, Facility Administrator DM, was unfamiliar with all aspects of the M1 form or nomenclature and simply drew the wrong conclusion from the use of the word "permanent" elsewhere on the form. While there has been no evidence suggesting that DM did this to intentionally discriminate against the Complainant, the result is still that Complainant was fired because of his disability or perceived disability.

f. The incident that clearly contributed to Complainant's termination was his decision to try and move a hospital bed, unassisted, from one room to another. At the time, the Complainant was under clear restrictions not to lift anything weighing more than 15 pounds with his left arm, and even then, to lift no higher than his waist. It must also be noted that the Complainant was left handed. While the Complainant has disputed that bed and frame in question weighed "400 pounds," as alleged by the Respondent, even he places the weight of the bed at over approximately "125 pounds." Prior to anyone offering to help him, the Complainant stated that he removed by the headboard and footboard of the bed, *flipped in onto its side*, and then attempted to push it through the doorway. Although the Complainant claims that he was able to accomplish all of those tasks without ever using his left hand for anything more than "balance," it is difficult to imagine how one might flip a bed of that size onto its side, not only using one hand, but using the hand that is not your strongest to begin with. Further, if the bed was so light that it could be flipped onto its side so easily, why would the Complainant have had such a hard time maneuvering it through the doorway, especially after someone stopped to assist him? Also, while it is true that the then existing restrictions only covered "lifting" with his left arm and not "pushing" or "pulling" or "shoving," clearly common sense would dictate that if one should not be lifting any object weighing more than 15 pounds (and only to waist high) that flipping, or pushing, or shoving an object nearly ten times that weight limit with the same injured arm is inadvisable as well, even if the doctor may not have specifically enumerated all possible prohibited motions that might cause further damage to the arm. For instance, the doctor also did not expressly prohibit the Complainant from hanging by his left arm by a chip up bar, even though that would presumably place far more stress on the arm than lifting a 15 pound object to waist high.

g. However, rather than use this last incident of insubordination in order to reasonably terminate the Complainant for openly disregarding his doctor's medical restrictions, as well as the Respondent's repeated directives to do so, the Respondent also included as a basis for the termination that they were also unable to accommodate what they (mistakenly) believed to be "permanent" restrictions. But at the time of termination, the Respondent concedes that no dialogue took place, with either the Complainant or his doctor, to at least explore whether there may have been a way to accommodate even these stringent restrictions, after identifying the essential functions of the Complainant DOM position. While the Complainant characterizes "90%" of his duties as "behind a desk," the job description, as well as the Complainant's own description of some of his duties (shoveling snow and picking ice, moving a hospital bed, changing a light and ballast...)

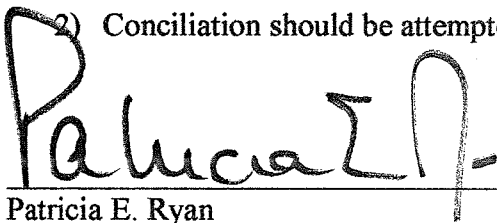
suggest that while he may have had the authority to delegate a number of these tasks and presumably remain "behind his desk," he apparently took pride in his own ability to complete a certain job and routinely did so even if he had available help at hand. While it may be true that the ability to "lift or transfer objects up to 100 lbs." found in the job description was rather infrequent, and presumably could be accommodated, the inability to do any overhead work, or to lift anything weighing more than 15 pounds (with one's dominant hand) above the waist, is clearly going to exclude much more than just peripheral or highly infrequent tasks that might reasonably be accommodated. In this case, the Complainant has also conceded that the work restrictions imposed in the M1 have never been modified, because of no significant improvement in the Complainant's shoulder condition even to this day, so it these restrictions have become de facto "permanent." However, regardless of whether the Respondent reached that same conclusion by virtue of misinterpreting the M1, it was nonetheless required to engage in the interactive process with the Complainant and come to that conclusion only after discussing whether reasonable accommodation may have been possible in light of the essential functions of the Complainant's position.

h. In sum, while it is probable that the Complainant would not have been able to perform his job given the essential functions of his position and the highly restrictive nature of his last set of work restrictions, the Respondent reached that conclusion without at least exploring whether any reasonable accommodations could have been made. Although the Respondent appears to have ample grounds to terminate the Complainant based upon his repeated failure to comply with his work restrictions and work in safe manner, the Respondent's decision to further bolster its case for termination by also including as a basis that the Complainant's restrictions were permanent and could not be accommodated, prior to any effort to discern if that was indeed the case, was discrimination based upon physical disability under the MHRA.

VI. RECOMMENDATION:

For the reasons stated above, it is recommended that the Maine Human Rights Commission issue the following finding:

- 1) There are **Reasonable Grounds** to believe that the Respondent Skowhegan SNF Operations d/b/a Cedar Ridge Center terminated the Complainant, Terry Dellarma, due to disability discrimination; and
- 2) Conciliation should be attempted in accordance with 5 M.R.S.A. § 4612(3).



Patricia E. Ryan
Executive Director



Robert D. Beauchesne
Field Investigator

EMPLOYEE

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RESTRICTIONS YES/NO	DESCRIBE:
	<p>ORIGINAL WORK / ADDITIVE USE AS CONTAINER</p> <p>LIFTING = (L) ARM < 15 lbs</p> <p>TO WASH LEVEL ONLY</p>

NARRATIVES ATTACHED? ☐ YES ☐ NO

WCB M-1 (2/00) DISTRIBUTION: PRACTITIONER (1) EMPLOYEE (2) EMPLOYER (3) INSURANCE COMPANY (4)

2-26-08

Terry was in office and tried to pick up typewriter from floor with bad arm, then said how much it hurt. I picked it up and told him not to try to lift anything with that Arm, as he was told not to use at all. He has an appointment 03-11-08 with orthopedic doctor. He is on vacation from 02-29-08 thru 03-12-08.

04/14/2008
Monday

This afternoon I was walking down the hall and witness Terry Dellarma going down the hall in front of me with 2 large jugs of chemicals in each hand. I hollered down to him, that I don't think that is really very good for your shoulder. He did not acknowledge what I said.

From: [REDACTED]
Sent: Monday, March 17, 2008 10:15 AM
To: [REDACTED]
Subject: Terry

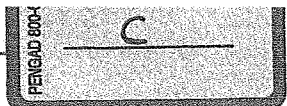
I just wanted to let you know that Terry and [REDACTED] changed balisters and lights in Mikes office today and he used his left arm.

March 24, 2008


I was going to get coffe this morning and saw Terry Dellarma with a shovel and ice pick in his arms and it looked like he had been outside. I told our administrator at that time. I then talked to Terry and he said that Mike had told him to hire some one to remove ice but he couldn't get anyone to do , so he worked at it all week-end and today, said he was using right arm instead.

[REDACTED]
Benefits Designee

March 27, 2008



Terry in office talking to myself and Cindy. He was saying again how he can do things but not all things. I asked him why he would continue to do the picking and shoveling ice when it could ruin his right arm if he uses that one, he said he knew in time he would hurt it anyway. He said if he didn't do the work no one would and it needed to be done for the State, I told him that he should have waited to talk to Mike, if he couldn't get anyone to do it. He said it didn't matter because he was going to continue to do what has to be done, no matter what.


Benefits Designee

On March 27, 2008, I had a conversation with Terry Dellarma. We were in my office. It was myself, Terry and Lana Caswell. The conversation was about the fact of him chipping ice. I said you were told not to do it. By us Mike and your doctor. So why are you doing it. He said there was no one else to do it. I said, so you need to refuse to do it. He said that he had been here this weekend with his boy but he also did the chipping. He started to say the trick is.....and I said the trick is not to do it. He said he has been and will continue.


Office Manager

TERRY DELLARMA
DOB: 10-25-58

03-18-08

This 49-year-old gentleman presents today with concerns relating to his left shoulder. I actually saw Terry last May following his motor vehicle accident when he apparently had sustained a dislocation of his shoulder and was initially treated in Skowhegan. He was subsequently referred to [REDACTED] at Orthopaedic Associates in Portland, who discussed treatment options with Terry. According to Dr. [REDACTED]'s note, he recommended a diagnostic arthroscopy and then likely an open procedure to at least perform a biceps tenodesis and try to salvage as much of the cuff as possible. Terry tells me that he decided not to proceed with surgery because there was a good chance that it would not improve him that much in his view. He was also concerned by the amount of time from work that he would miss in rehabilitation.

Terry has been continuing to work at Cedar Ridge in Skowhegan. He says that he is able to do 90% of his job; but there is a physically demanding 10%, particularly when he is chiseling snow and ice, that his shoulder is aggravated and he has severe pain. He has not had any neurologic symptoms.

Terry has not been taking any anti-inflammatories.

Terry is left-handed.

PAST MEDICAL HISTORY: As documented in May, 2007. Significant for hypertension, COPD and severe burns as a child, which warranted multiple skin grafting procedures.

MEDICATIONS: Lisinopril, Multivitamin, and Baby ASA.

ALLERGIES: Crestor and Ethos.

Constitutionally, Terry has been generally well with no unexplained weight loss, fevers, chills, or night sweats.

On examination, Terry is in no distress. He demonstrates 120 degrees of active forward elevation in abduction of the left shoulder. The drop arm sign, however, is positive. The rotator cuff does tend to give-way when stressed in both the abducted and adducted positions. These maneuvers are uncomfortable for Terry. The impingement sign is positive. There is slight crepitus noted with shoulder circumduction. Distal neurovascular examination is grossly normal.

We performed AP, Y-scapular and apical oblique views of the left shoulder. There is evidence of narrowing in both the glenohumeral joint and the acromiohumeral interval. There is no calcification in the subacromial space. There are recent degenerative changes as well about the glenoid.

Terry has evidence of a rotator cuff arthropathy. This is not surprising given the degree of tearing which he sustained last year. I explained to Terry that this condition is a sequelae of the

RECEIVED APR 02 2008

TERRY DELLARMA
DOB: 10-25-58

03-18-08 CONT'D ...

trauma of last year and, therefore, not work related in my view. His exacerbation of pain with increased levels of activity he does at work, however, is not unexpected. No doubt there are some activities that he will not be able to do because of his rotator cuff deficiency.

Unfortunately, there is not much that I can offer him today. As I explained to Terry last year, given the degree of damage that he has, I did not feel comfortable taking on the surgical case, which is why I recommended referral to a sub-specialist. If he does wish to revisit surgery, he should contact Dr. [REDACTED]'s office. I did suggest that he try some anti-inflammatories, as these might help settle down the present exacerbation and alleviate some of his pain. I also provided Terry with some exercises he can do on his own to help maintain some range of motion as best as he can manage.

I did suggest some workplace restrictions. I do not think that he is going to be able to do overhead work effectively, and he should limit lifting with the left upper extremity to not more than 15 pounds at waist level only. As he feels more comfortable, he may be able to increase these restrictions.

Based on the fact that I do not feel I cannot do much more for Terry than this, I referred Terry to the continued care of his family physician. Terry is agreeable with this strategy. VMC:hsj

cc: Worker's Compensation

[REDACTED] D.O.

W. J. COLLETT, M.D.
240 [REDACTED] Dr.
100 [REDACTED] St.
(202) [REDACTED]
Fax [REDACTED]